IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3777 OF 2006

IN

SUMMARY SUIT NO.1832 OF 2006

Jet Airways (India) Ltd. ...Plaintiff.

vs.

Mr.Subrata Roy Sahara ...Defendant.

Mr.Harish Salve Sr.Counsel with Mr.Ravi Kadam A.G., Mr.Janak Dwarkadas, Sr.Counsel, Mr.Zal Andhyarujina, Mr.R.J.Gagrat, Ms.Gayatri Goswami, Mr.V.N.Kulkarni, Mr.M.Salian Ms.Meenakshi Grover, Mr.Ankur Chawla, Ms.Siddh Vidya and Mr.A.Deshmukh, Advocates i/b. Gagrats, for Plaintiff.

Mr.F.S.Nariman, Sr.Counsel with Mr.Veerendra Tulzapurkar, Mr.K.K.Lahiri, Mr.Pradeep Sancheti, Ms.Alpana Ghone, Mr.Aarohi Bhalla, Mr.Satish Kishorchandani, Mr.Sajit Suvarna, Mr.Jatin Pore, Ms.Avantika Bajaj i/b. DSK Legal, for Defendant.

CORAM: D.K.DESHMUKH, J.

DATED: 28th FEBRUARY,2007.

P.C.:

1. This notice of motion has been taken out by the defendant under Section 8 of the Arbitration and Conciliations Act,1996 (hereinafter refer to as "the Act" for the sake brevity). The facts that are relevant and material for deciding this notice of

motion are as under:-

. The plaintiff in this suit - Jet Airways (India) Ltd is a company registered under the Companies Act and is engaged in the business of operating a commercial airline in India and to and from certain other countries in the world. The Sahara Airlines Limited is also a company incorporated under the Companies Act. The defendant Subrata Roy Sahara is the Chairman and the Managing Director of Sahara Airlines Limited. He also holds 1,15,57,225 equity shares of Sahara Airlines Ltd. There are other shareholders of Sahara Airlines Ltd. apart from the defendant. One of the major shareholder is Sahara India Commercial Corporation Ltd. An agreement was entered into on 18.1.2006 between the Jet Airways (India) Ltd. and the shareholders of Sahara Airlines Ltd. including the defendant for sale of 100% of the issued, subscribed and paid up share capital in Sahara Airlines Ltd. to the plaintiff on the terms and conditions stated in the agreement dated 18.1.2006. Two important aspects of that agreement which are relevant for the present purpose are that the total agreed consideration was Rs.2000 crores which amount was kept in escrow by Jet Airways (India) Ltd. and for that purpose an Escrow

Agreement was entered into. The transaction was to be completed within a period of 65 days. The second aspect which is relevant is that there is an arbitration clause contained in this agreement (which is hereinafter referred to as "SPA".) The transaction could not be completed within the period of 65 days as agreed between the parties in the SPA and therefore, the parties decided to extend period from 65 days to 165 days, for that purpose the parties entered into an amendment agreement. That amendment agreement is dated 29.3.2006. The important changes relevant for the present purchase which were incorporated in the main agreement (SPA) by the amendment agreement are that (i) the closing date was extended; (2) out of the amount of Rs.2000 crores which were kept in escrow, the amount of Rs.500 crores was to be released in favour of the selling shareholders; (iii) the shares which were agreed to be transferred to Jet Airways (India) Ltd. were to be pledged and for that purpose a pledge agreement was entered into; (iv) the defendant Subrata Roy Sahara one of the selling shareholders executed a personal guarantee in favour of Jet Airways to secure repayment of the amount of Rs.500 crores which was released as stated above. The disputes arose between the parties. On 20.6.2006 the selling share holders

filed two petition under Section 9 of the Arbitration and Conciliation Act,1996 before the District Judge at Lucknow, seeking some interim measures of protection. The plaintiff-Jet Airways had also filed an application under Section 9 of the Act on the same day i.e. on 20.6.2006 in this Court which was registered as Arbitration Petition no.261 of 2006 seeking certain interim measures of protection. Jet Airways also filed the present suit in this Court seeking money decree against Subrata Roy Sahara. This suit is based on the personal guarantee agreement between the plaintiff Jet Airways and the said Subrata Roy Sahara. In the matters filed before the Lucknow District Judge some interim orders were passed by that Court. The Supreme Court was moved by Jet Airways. The Supreme Court disposed of the proceedings filed before it by Jet Airways by its order dated 28.8.2006. The Supreme Court directed this Court to consider the question "whether this Court inherently lacks jurisdiction to entertain two petitions filed by the selling shareholders at Lucknow and one application filed by Jet Airways in this Court as also the summary suit filed by Jet Airways in this Court." This Court by order dated 21.9.2006 held that this Court does not inherently lacks jurisdiction to entertain the above referred

proceedings. Thereafter, this Court heard two proceedings filed before the Lucknow Court and one arbitration petition filed in this court on merits and disposed then of by order dated 22.9.2006. It is common ground that the arbitration proceedings have been initiated and are presently pending. The present notice of motion has been taken out by the defendant because according to the defendant there is an arbitration agreement between the parties, and therefore, in view of the provisions of Section 8 of the Act this Court should refer the parties to arbitration.

2. The learned Counsel appearing for defendant submits that the suit is based on the personal guarantee agreement. The personal guarantee agreement flows out of the SPA. There is admittedly an arbitration agreement contained in the SPA. It is submitted that when the matter was argued before this court pursuant to the direction made by the Supreme Court, it was the case of the plaintiff that the Escrow agreement, the pledge agreement and the guarantee agreement are integral part of the SPA and as the Escrow agreement, pledge agreement and the guarantee agreement confer exclusive jurisdiction on this Court, this Court has exclusive jurisdiction to

deal with the disputes arising out of the SPA. It is submitted that it is on this basis that it was contended by the plaintiff that there is no inherent lack of jurisdiction in this Court to entertain petition under Section 9 of the Act filed by the selling shareholders in the Lucknow Court. This submission has been accepted by this Court and it has been held that this Court does not inherently lacks the jurisdiction to entertain the petition filed in Lucknow Court which is related to the disputes arising out of the SPA. It is submitted that thus the deed of personal guarantee on which the present suit is based is the integral part of the SPA and therefore, the arbitration clause contained in the SPA will cover the disputes arising from the deed of personal guarantee also. It is further submitted that by the amendment agreement dated 29.3.2006 clause 5.4A has been incorporated in the SPA, the deed of personal guarantee has been executed pursuant to clause 5.4A in the SPA, the terms on which the personal guarantee is to be given are also incorporated in clause 5.4A, therefore, the deed of personal guarantee is really a part of the SPA. It is submitted that when the parties decided that the closing date was to be extended, the parties decided to extend the closing date subject to certain terms

and conditions. One of the terms was that the selling shareholder should get the amount of Rs.500 Crores out of the amount of consideration kept in Escrow and to secure repayment of that amount two deeds were to be executed viz. (i) deed of personal guarantee and (ii) deed of pledge of the shares. It is submitted that after the amendment agreement was entered into the amendment agreement became the part of the SPA and therefore, the transaction between the parties is contained in three agreements viz. (i) SPA as amended by the amendment agreement, (ii) deed of personal guarantee and (iii) pledge agreement. Relying on the judgment of the Supreme Court in the case "S.Chattanatha Karayalar Vs. The Central Bank of India Ltd & others, AIR 1965 Supreme Court 1856" it is submitted that where the transaction between the same parties is contained in more than one document, all those documents must be read and interpreted together and they have the same legal effect for all purposes as if they are one document. The learned Counsel appearing for defendant also relies on the judgment of the Supreme Court in the case "Alimenta S.A. Vs. National Agricultural Co-operative Marketing Federation of India Ltd. and another, (1987)1 Supreme Court Cases 615". It is further submitted that the plaintiff once having

taken a stand that the pledge agreement and the guarantee agreement are integral part of the SPA cannot now turn around and say that the disputes arising out of the guarantee agreement is not covered by the arbitration agreement contained in SPA. It is further submitted, by referring to the provisions of sub-section (5) of Section 7 of the Act that perusal of SPA and the guarantee agreement show that in the guarantee agreement not only the SPA which contains arbitration clause is referred to but it is clear that the guarantee agreement has been entered into because of the SPA. It is submitted that the reference in the guarantee agreement to the SPA is such as to make the arbitration clause a part of the guarantee agreement. In this connection reliance is placed on clause 12A and 12B of the amendment agreement. It is further submitted that clause 8 of the guarantee agreement which shows that this Court will have jurisdiction to settle any disputes arising between the parties, does not indicated that the arbitration clause contained in SPA is not applicable. it is submitted that even if the arbitration clause exists between the parties, the parties are still have to go to Court either for interim measures of protection or for appointment of arbitrator and it is for that purpose it is indicated

that this Court will have jurisdiction. On behalf of the plaintiff on the other hand it is submitted that though the deed of guarantee is entered into because of the amended SPA the guarantee is a stand-alone guarantee. The guarantee has been furnished on unconditional terms. In support of this submission the learned Counsel appearing for plaintiff relied on several judgments of the Supreme Court dealing with the power of the Court to stop encashment of bank guarantee and has submitted that the Supreme Court has held that the contract of guarantee is an independent and distinct contract between the bank and the beneficiaries and is not qualified by the underlying transaction. It is submitted that it is a settled law that in terms of the bank guarantee, the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. By referring to various terms in the guarantee agreement, it is submitted that the personal guarantee given by the defendant is unconditional guarantee and therefore, according to the learned Counsel, the arbitration clause in SPA is not applicable for resolving the disputes arising under the agreement of guarantee. It is further

submitted that merely because in the guarantee agreement certain terms in the SPA have been referred to it will not amount to incorporation of arbitration clause contained in SPA. The learned Counsel appearing for plaintiff also contended that the plaintiff is not seeking any relief before the Arbitral Tribunal based on the pledge agreement. So far as the submissions made on behalf of Jet Airways before this Court which was relied on by the defendant is concerned, the contention of the plaintiff is that the submission of the plaintiff before the Court at that time was that the Escrow agreement, the pledge agreement as well as the guarantee agreement relate to or are part of the SPA in the commercial sense.

3. Admitted position is that the arbitration clause is contained in the SPA. The arbitration clause reads as under:-

> "19.1 If any dispute arises between the parties during the subsistence of this Agreement or thereafter, in connection with the validity, interpretation, implementation or alleged breach of any provision of this Agreement or regarding any

question, including the question as to whether the termination of this Agreement has been in accordance with the terms of the Agreement ("Dispute"), the Parties shall endeavour to settle such dispute amicably. The attempt to bring about an amicable settlement shall be considered to have failed if not resolved within 30(thirty) days from the date of the Dispute.

19.2 In the event the Dispute is not settled in accordance with Clause 19.1 above, any Party to Dispute may serve notice of arbitration upon the other party invoking this Clause and making a reference to a sole arbitrator named therein. In the event the other disputing Party(ies) disagrees to the appointment of such sole arbitrator suggested by the other Party, (a) if the Dispute arises prior to the Closing the Purchaser shall appoint 1 (one) arbitrator, and the Selling

> Shareholders and the Company shall jointly appoint the other arbitrator;
> (b) if the Dispute arises after the Closing, the Purchaser and the Company shall jointly appoint 1 (one) arbitrator, and the Selling Shareholders shall appoint the other arbitrator. The two arbitrators appointed by the Parties shall mutually appoint a third arbitrator, who shall be the presiding Arbitrator."

Perusal of the above quoted clause shows that any dispute arising between the parties during the subsistence of the SPA and thereafter in connection with its validity, interpretation and implementation are to be referred to arbitration. In the amendment agreement it is stated thus:-

> (c) the parties have agreed to extend the term of the SPA upon certain additional terms in respect of the transaction contemplated under the SPA which are in variance with the existing terms of the SPA; and

(d) the parties are desirous of recording the said additional terms by amending the SPA in the manner hereinafter appearing.

Perusal of the above recitals makes it clear that the terms of the amendment agreement become part and parcel of the SPA. By clause (3)(b) of the amendment agreement clause 5.4A was incorporated into the SPA. It reads as under:-

"5.4A Notwithstanding anything stated in the Agreement:-

(i) On the date of the execution of this Amendment Agreement, the Purchaser shall out of the Total Consideration pay an amount of Rs.500,00,00,000/- (Rupees Five Hundred Crores) to the Selling Shareholders towards purchase of the Existing Equity Shares ("Advance Amount") by issuing appropriate instructions to the Escrow Agent for release of the said Advance Amount to SICCL. If the Closing occurs; this

Advance Amount shall be adjusted towards the Equity Shares Purchase Price and the Selling Shareholders shall be entitled to the balance lying with the Escrow Agent. If the Agreement terminates or expires in accordance with Clause 18 of the SPA, SICCL absolutely and unconditionally undertakes to repay this Advance Amount to the Purchaser, within a period of 7 (seven) days from the date of such termination/expiry of the Agreement,without any demur, dispute or delay.

(ii) Simultaneously upon the execution of this Amendment Agreement, the Parties shall execute a Pledge Agreement, pursuant to which the Selling Shareholders shall pledge the Sale Shares in favour of the Purchaser to secure the repayment of the Advance Amount. The Selling Shareholders undertake to ensure that a valid and registered pledge over the Sale Shares (in favour of the

Purchaser) is created and a confirmatory account statement is furnished to the Purchaser by the depository participant and the depository within 7 (seven) days of the date hereof. Only upon the repayment of the Advance Amount by the Selling Shareholders to the Purchaser in accordance with this Clause, will this pledge shall stand released and discharged (in accordance with the terms and conditions of the aforesaid Pledge Agreement), failing which the Purchaser will be entitled to forthwith enforce the Pledge Agreement.

(iii) Simultaneously upon the execution of this Amendment Agreement, Mr.Subrata Roy Sahara (one of the Selling Shareholders) shall execute a Personal Guarantee in favour of the Purchaser, to secure the repayment of the Advance Amount. Only upon the payment of the Advance

> Amount by the Selling Shareholders and/or the Guarantor to the Purchaser in accordance with this Clause, will the Personal Guarantee stand released and discharged (in accordance with the terms and conditions of the aforesaid Personal Guarantee), failing which the Purchaser will be entitled to forthwith enforce the Personal Guarantee.
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> (iv) It is hereby clarified for the removal of doubt that the Selling Shareholders shall not be liable to pay any interest on the Advance Amount to the Purchaser."

Perusal of the above quoted clause 5.4A shows that on the date of the amendment agreement, an amount of Rs.500 crores was to be paid to the selling shareholders towards purchase of existing equity shares and to secure repayment of that amount if the occasion arises, the selling shareholders were to execute a pledge agreement pledging the shares which were agreed to be sold to Jet Airways, and one of the selling shareholders i.e. defendant viz. Mr.Subrata

Roy Sahara was to execute a personal guarantee in favour of Jet Airways to secure repayment of advance amount. Perusal of clause 5.4A(iii) shows that not only the requirement of the defendant executing a personal guarantee is incorporated but the terms on which the personal guarantee is to be given are also mentioned. Therefore, if any dispute arises between the parties as to the invocation of the personal guarantee, in my opinion, it will be a dispute arising in connection with the SPA as amended by the amendment agreement, and the dispute therefore, will be covered by clause 19 of the SPA. The agreement of personal guarantee is not independent of the SPA. It is executed because of a clause contained in the SPA and the principal terms on which that personal guarantee is to be given are also incorporated in the SPA. The parties to the personal guarantee are also parties to the S.P.A. It is settled law that an arbitration agreement is to be liberally construed so that it covers all disputes between the parties to the arbitration agreement on the subject matter of the arbitration agreement. The subject matter of the arbitration clause contained in the S.P.A. is the disputes arising between the parties to the S.P.A. in relation to and in connection with the S.P.A.. A dispute arising between the Jet Airways and the

defendant who are both parties to the S.P.A., in relation to the personal guarantee, would be a dispute arising in relation and in connection with the S.P.A. Therefore, in my opinion, the dispute between the plaintiff and the defendant is arbitrable under clause 19 of the S.P.A.

4. It is further to be seen that the transaction between the parties was that the shareholders of Sahara Airlines Ltd. agreed to sell their shareholdings to Jet Airways for an amount of Rs.2000/- crores. The transaction was to be completed by a particular date. The parties, thereafter, agreed to extend that date and at that time the parties arrived at some additional agreement. The selling shareholders were to be paid an amount of Rs.500 crores from the total amount of Rs.2000 crores as advance payment against the price of the shares. That amount was to be repaid by the selling shareholders in case the agreement is terminated or it expires, and to secure repayment the shares which were agreed to be sold were pledged by the selling shareholders and the another security given was the personal guarantee of the defendant. Thus, when the SPA was entered into, the agreement between the parties was contained in two documents

viz. Escrow agreement which contains the provision for keeping the amount for consideration i.e. Rs.2000/- crores in Escrow and the SPA. On 29.3.2006 the parties executed three additional agreements i.e. (i) amendment agreement, (ii) pledge agreement and (iii) personal guarantee agreement and the transaction between the parties was now contained in four different agreements viz. (i) the escrow agreement (ii) the SPA (as amended by the amendment agreement), (iii) the pledge agreement and (iv) the personal guarantee agreement. If any one of these agreements is ignored or excluded the transaction between the parties would not be complete. The Supreme Court has considered such a situation in its judgment in the case "S.Chattanatha Karayalar Vs. The Central Bank of India Ltd. & others" referred to above. The Supreme Court in paragraph (3) has observed thus:-

> "The principle is well established that if the transaction is contained in more than one document between the same parties they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document. In Manks v. Whiteley, 1912-1 Ch 735

at page 754, Moulton, L.J.stated:-

> . Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the other being executed also and is intended to speak only as part of the one transaction and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole."

The Supreme Court has, thus, laid down the law in unequivocal term that if the terms of one transaction are incorporated in several documents and it is between the same parties then all those documents have the same legal effect as if they are one document. In the present case, the deed of personal guarantee, the pledge agreement and the SPA are between the same parties and they incorporate terms of one transaction between the parties and therefore, they will have to be read as one document and if they

are to be read as one document, the arbitration clause contained in the SPA will be available for resolution of disputes arising between the parties to the agreements in connection with any of these three documents. The submission now made by the defendant that the S.P.A., the pledge agreement and the personal guarantee agreement have to be taken as one document was exactly the stand taken by the plaintiff before this Court when the Court was considering the question whether this Court inherently lacks the jurisdiction to entertain the application filed under Section 9 of the Arbitration Act in relation to the disputes arising out of the S.P.A. It was a specific stand taken by the plaintiff that because the pledge agreement and the personal guarantee agreement confer exclusive jurisdiction on this Court and because the pledge agreement and the personal guarantee agreement are integral part of the S.P.A., this Court has the jurisdiction to entertain petition filed under Section 9 of the Arbitration Act in relation to the disputes arising out of the S.P.A. This submission of the plaintiff has been referred to in paragraph 5 of the order dated 21.9.2006 as follows:-

> "It is further submitted that even the Pledge agreement is also a part of the deal. Clause 18:2:1 and

18:2:2 of the Pledge agreement confer exclusive jurisdiction on this court to deal with the dispute arising out of the Pledge agreement. According to the learned Counsel the Pledge agreement arose out of SPA. The learned Counsel further submits that the agreement of guarantee on which the summary suit is based has clause 8:2:1, which confers exclusive jurisdiction on this court to entertain civil suit in relation to the dispute arising out of the guarantee agreement. The learned Counsel submits that therefore in view of these various clauses in these agreement it can be said that not only that there is no inherent lack of jurisdiction in this court, but this court has exclusive jurisdiction to entertain the disputes between the parties arising out of the SPA and the other connected agreements. The learned Counsel submits that as escrow agreement, the pledge agreement and

> the guarantee agreement are integral part of SPA and as the escrow agreement, the pledge agreement and the guarantee agreement confer exclusive jurisdiction on this court, this court will have the exclusive jurisdiction to deal with disputes arising out of the SPA."

When this stand was pointed out to the plaintiff, the only submission made in that regard was that according to the plaintiff the pledge agreement and the personal guarantee agreement are integral part of the S.P.A. in the commercial sense. The submission obviously cannot be accepted. In view of the judgment of the Supreme Court in the case of "Central Bank of India" referred to above, in my opinion, the issue is no more debatable. The plaintiff, having once taken a stand that the pledge agreement and the personal guarantee agreement are integral part of the S.P.A. now cannot be permitted to contend otherwise, in any case without disclosing a valid reason for doing so, I do not see any reason given by the plaintiff for changing their stand. Thus, according to the plaintiff also the personal guarantee agreement is an integral part of the S.P.A., as

pointed out above, parties to the personal guarantee agreement are also parties to the S.P.A., therefore any dispute arising between the parties to the personal guarantee agreement in relation to that agreement would be a dispute arising in connection with the S.P.A. and hence, that dispute would be arbitrable under clause 19 of the S.P.A.

5. The term arbitration agreement is defined by section 2(b) of the Arbitration and Conciliation Act to mean an agreement referred to in Section 7. Perusal of section 7 of the Act shows that one of the primary requirements of the arbitration agreement is that it should be in writing. Sub-section (5) of Section 7 of the Act is relevant for the present purpose. It reads as under:-

> "7. Arbitration Agreement:-
> (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

Perusal of the above provisions shows that if an arbitration clause is contained in one agreement and if that agreement is referred to in another agreement and the reference is such as to make the arbitration clause in the first agreement part of the other agreement then it can be said that there is an arbitration agreement between the parties. If from this point of view different clauses in the amendment agreement are seen the conclusion, that arbitration clause contained in S.P.A. is part of the personal guarantee agreement, is inevitable. In my opinion, clause 12 of the amendment agreement is relevant which reads as under:-

> "12. MISCELLANEOUS
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> (a) All terms used herein shall, unless otherwise defined or unless the context otherwise require, have the same meaning assigned to them under the said Agreement.
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> (b) The Parties agree that this Amendment Agreement shall be deemed to form part of and incorporated into

> the Agreement, as from the date hereof. This Amendment Agreement and the SPA shall be read as a whole, and shall constitute the entire understanding between the Parties relating to the subject matter hereof. Except to the extent modified by this Amendment Agreement, all the other terms and conditions of the Agreement along with the Annexures thereto shall continue to bind the Parties thereto as before and none of the rights and obligations of any Party to the Agreement, shall, except for the modifications contained in this Amendment Agreement be deemed to be altered or modified in any manner whatsoever."

Perusal of the above said clause 12 shows that the terms used in the amendment agreement have the same meaning which is assigned to them in SPA, and that the amendment agreement and the SPA are to be read as a whole and they together constitute the entire transaction between the parties. Perusal of the

guarantee agreement shows that it recites that the reason for entering into this agreement is the amendment agreement, then clause 5.4A of the amendment agreement is quoted and then it is stated that "Terms defined in the Share Purchase Agreement shall, unless otherwise defined in this Deed, bear the same meaning when used in this Deed." It is, thus, clear that the SPA is referred to in the amendment agreement as also in the guarantee agreement. It goes without saying that when the amendment agreement was entered into and the guarantee agreement was entered into, the parties were aware of the existence of the arbitration clause in the SPA. Therefore, in my opinion, it is clear that reference to the SPA in the guarantee agreement clearly indicates that the intention of the parties was to make arbitration clause contained in the SPA applicable to the disputes arising under the guarantee agreement.

6. The submission of the defendant that because the guarantee executed by the defendant is a stand-alone guarantee and the defendant is obliged to make payment under the guarantee, moment the demand is made, payment under the guarantee cannot be withheld till the disputes between the parties arisen

between the parties out of the main agreement are settled is concerned, in my opinion, that aspect is not relevant at this stage. Whether the Court can withheld payment of the amount under the guarantee because the disputes under the main agreement are pending between the parties, is a question to be considered when the Court will take up for consideration the summons for judgment. At the present moment, the question to be considered is what is the remedy available to the plaintiff? If the remedy available to the plaintiff is a Civil Suit, in the summons for judgment it will be open to the plaintiff to contend that he is entitled to payment of amount forthwith on making demand. The same contention will be available to the plaintiff, even if the matter goes before the Arbitrator. The judgments of the Supreme Court which are relied on by the learned Counsel appearing for defendant shows that the contract of bank guarantee is an independent contract between the bank and the beneficiary and is not qualified by the underlying transaction, and therefore, it is held that the contract of bank guarantee is enforceable by the beneficiary against the bank. In all those judgments the Supreme Court was not considering "whether the arbitration clause contained in the contract between beneficiary and the

person at whose instance the bank is giving guarantee, is applicable to the enforcement of bank guarantee. Obviously, because the bank is not a party to the underlying contract between the beneficiary and the person at whose instance the bank has given the guarantee. In the present case, the person in whose favour the personal guarantee is given as also the person who has given the guarantee both are parties to the underlying contract which contains the arbitration clause. Therefore, in my opinion, the decision of the Supreme Court on enforcibility of the Bank guarantee will not be relevant for deciding the question that arises for consideration in this notice of motion.

7. The learned Counsel appearing for defendant relied on clause 5.1 and clause 8 of the Personal Guarantee agreement. Clause 8 of the guarantee agreement recites that this Court will have jurisdiction to settle any dispute which may arise from or in connection with the deed of guarantee and submitted that this clause indicates that the parties are agreed that the disputes arising out of the deed of guarantee are not arbitrable and that the Civil Suit can be entertained by this court. In my opinion, clause 8 cannot be construed as indicating

the intention of the parties not to go to arbitration, specially because of the existence of arbitration clause in the SPA. Even if there is an arbitration clause between the parties, the parties can indicate the Court which will have the jurisdiction because the Court having the jurisdiction will become relevant for various purposes even for resolution of disputes under the Arbitration and Conciliation Act. Even for appointment of arbitrators it will be relevant to find out which Court will have jurisdiction to entertain the suit between the parties on the same subject matter in view of the provisions of Section 11(12) of the Act. There are some provisions in the Arbitration Act which permit recourse to Court even when there is an arbitration clause between the parties. Therefore, a recital in the agreement specifying the Court which will have jurisdiction in the event of disputes arising between the parties cannot be understood to negate the existence of arbitration agreement between the parties by itself. In a case, where parties enter into arbitration agreement and they find, that, in the event of dispute arising between them, more than one Court will have jurisdiction to entertain the application and petition which are required to be filed before

Court under the Arbitration Act, they can agree to include a clause in the agreement that only one of the several Courts will have the jurisdiction. Thus, there is a possibility of parties including a jurisdiction clause like the one we have in the personal guarantee agreement even if admittedly there is an arbitration agreement between the parties. In these circumstances, solely because, the parties have included the jurisdiction clause in the guarantee agreement one cannot conclude that there is no arbitration agreement between the parties, ignoring the other circumstances indicated above which show that there is an arbitration agreement between the parties.

8. In my opinion, one more aspect that has to be considered is that admittedly there is a pledge agreement between the parties which is of the same date i.e. 29.3.2006. Clause 18.2.1 contains provision which is identical to the above referred provision in the personal guarantee agreement. Clause 1.2.1 of the pledge agreement reads as under:-

> "The provisions of the SPA shall apply to this Agreement hereto as if expressly set out herein (mutatis

mutandis) with each reference to the SPA being deemed to be a reference to this Agreement."

Thus, it is clear that by this term of the pledge agreement, the terms of the SPA including the arbitration are incorporated in this pledge agreement. Still in the pledge agreement a provision is made conferring jurisdiction on this Court. Therefore, in my opinion, the clause by which the parties say that this Court will have jurisdiction to resolve the disputes between them does not indicate absence of existence of arbitration clause between the parties. It is further to be seen that the plaintiff in the proceedings pending before the Arbitrators, apart from claiming vacation of the interim order passed by the Lucknow Court, have also sought several reliefs in relation to the pledge agreement. In my opinion, therefore, mere existence of clause 8 referred to above in the personal guarantee agreement will rule out applicability of clause 19 of the SPA to the disputes raised in the present suit.

9. Thus, I find that the defendant has made out that the disputes between the parties which have

raised in the present suit are arbitrable under clause (19) of the SPA. Therefore, as there is arbitration agreement in existence between the parties, the parties have to be referred to the arbitration. They are accordingly so referred. The notice of motion is disposed of.

10. As the parties are referred to arbitration, the summons for judgment and the suit stands disposed of. Refund of court fees as per the law.

. Parties to act on the ordinary copy of the order duly authenticated by the Private Secretary / Associate of the Court.

. C.C. be expedited.